No. 12,044

IN THE

United States Court of Appeals

For the Ninth Circuit

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

WALTER McDONALD,
Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

In his brief at page 3 appellee asserts that

> "The respondent's return to the order to show cause (R. 21) admits all the facts alleged in the petition but prays a denial thereof because of prior applications for writs (R. 22) made by the petitioner. The petitioner filed a traverse thereto (amended petition R. 13). Consequently the only defense to the application is that tendered by the return to the order to show cause and this is limited to a question whether the issue raised by the petition is foreclosed by prior applications for writs of habeas corpus."

This, incidentally, is an issue that appellee unsuccessfully urged before this Honorable Court in *Johnston*

v. McDonald, 11,210, 157 F. (2d) 275, which case was cited by appellant in his opening brief. Appellant reasserts here, as he did in that case, that the mere filing of a petition for a writ of habeas corpus, whether verified or unverified, does not import truth to its allegations nor is such verity imported by the issuance of an order to show cause or by the filing of a return to order to show cause. If a cause of action has been stated in the petition, and any exhibits attached thereto, and there is a factual issue involved, a writ of habeas corpus must of necessity issue, the petitioner produced before the Court and a hearing held so that it may ascertain the truth or falsity of the disputed allegations and draw a proper conclusion from such determination of the facts. If on the other hand, the petition and the attached exhibits do not state a cause of action then the Court may, without issuing the writ, dismiss the petition.

Dorsey v. Gill (CCA-DC), 148 F. (2d) 857, 866, 870, 871;

Walker v. Johnston, 312 U.S. 275, 284.

All this, however, is immaterial in our case at bar because the appellant did not limit, as appellee contends, his request for a denial of the instant application to the argument that the issue had already been decided adversely to appellee in the prior habeas corpus proceedings instituted by him. What the appellant did before Judge Denman was to urge him to deny the petition for writ of habeas corpus on the ground that the issue raised therein had been already decided adversely to the appellee, and failing in this request, he asked for a denial of the petition, after

the writ had issued, on the ground that the evidence adduced during the hearing on the writ before Judge Denman did not warrant the conclusion that the appellee had been denied his constitutional right of assistance of counsel before the trial Court.

Appellee is mistaken when he suggests that the appellant did not deny in his pleadings appellee's complaint that he had been denied his right of assistance of counsel before the trial Court. In this connection we quote from the return to order to show cause, as well as from the return to writ of habeas corpus filed herein. In the return to order to show cause the appellant alleged, among other things, "that the respondent is informed and believes that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the said trial court". (Tr. 26.) In his return to writ of habeas corpus appellant also made a similar allegation when he declared "that respondent is informed and believes and further alleges that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the trial court". (Tr. 11.)

Apparently appellee has fallen into error when he seeks to limit the question herein to the issue of whether there is, or is not, an absence of the *res judi-*

cata principle in habeas corpus proceedings. In this connection we quote the language of appellee under the heading "Argument", at page 5 of his opening brief:

> "The following argument is predicated solely upon the only defense tendered to the application for the writ. This defense is advanced in the return to the order to show cause (R. 21). It is limited to a question whether the issue raised by the petition is foreclosed by prior applications for the writ."

Thus appellee has devoted himself to a discussion of something that is not in dispute. The appellant concedes herein the absence of the *res judicata* principle in habeas corpus proceedings, and in this connection calls attention to pages 7 and 8 of his opening brief where he made his position in this regard extremely clear. It may be that appellee has misinterpreted what appellant said on these two pages, particularly these remarks of appellant:

> "If, as here, a Circuit Court, on the basis of certain evidence, decides that a prisoner has not been denied his constitutional right of assistance of counsel before the trial Court, a Judge of that same Circuit, be he a District Judge, or a Circuit Judge, not entertaining appellate jurisdiction, should not, with the same evidence before him in a subsequent proceeding, reach an entirely opposite conclusion, as Judge Denman has done."

In arguing in this wise, appellant in no way meant to convey the impression that he believes the *res judicata* principle is [redacted] applicable to habeas corpus

proceedings, but in making this assertion appellant still insists that Judge Denman should not have decided from certain evidence that appellee had been denied his constitutional right of assistance of counsel before the trial Court when on the basis of that same evidence the Circuit Court, of which he is a member, had in a prior habeas corpus proceeding reversed United States District Judge A. F. St. Sure, who had likewise held that appellee had been denied his constitutional right of assistance of counsel before the trial Court.

CONCLUSION.

To conclude, appellee has failed to discuss the only issue involved in this appeal, and that is the question of whether or not the evidence before Judge Denman properly supported a finding that the appellee had been denied the effective assistance of counsel before the trial Court. Appellant respectfully suggests that if appellee had attempted to meet the issue, that he could not have prevailed, in view of the arguments set forth and authorities cited by appellant in his opening brief.

It is therefore once more respectfully urged that this Honorable Court should conclude that Judge Denman's finding that appellee was denied his constitutional right of assistance of counsel before the trial Court was clearly erroneous and that accordingly the order of discharge should be reversed and the case remanded to Judge Denman with directions that he

enter a judgment denying the appellee relief for which he prayed.

Dated, San Francisco, California,
January 17, 1949.

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[redacted] United States Attorney,
Attorneys for Appellant.